EDITOR'S NOTE

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ORIGINAL

No. 90-5393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1989

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden, et al,

Respondent.

PETITIONER FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RECEIVED
1990
U.S.

PETITION FOR WRIT OF CERTIORARI

Jose M. Lozada
So Desert Co.r'l Ctr.
P.O. Box 208
Indian Springs, Nevada 89070

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER Term, 1990

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden, et al,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Jose M. Lozada, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the United States District Court, District of Nevada and the District Court, Clark County, Nevada, both have authorized pauper status in this case. Petitioner's affidavit in support of this motion and exhibits are attached hereto.

DATED this 23 day of July, 1990.

Respectfully submitted,

/s/ Jose M. Lozada

Jose M. Lozada
Petitioner In Pro-Per
P.O. Box 208
Indian Springs, NV. 89070

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, **Jose M. Lozada**, being first duly sworn, depose and say that I am the petitioner in the above-entitled case, that in support of my Motion for Leave to Proceed In Forma Pauperis, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes___ No. X
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   ---

   b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.
   November 11, 1986, $1,000.00 per month.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes___ No. X
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

   ---

3. Do you own any cash or checking or savings account?
   Yes___ No. X
   a. If the answer is yes, state the total value of the items owned.

   ---

4. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X
   a. If the answer is yes, describe the property and state its approximate value.

   ---

5. List the persons who are dependent upon you for support and state your relationship to those persons.
   None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Jose M. Lozada

Subscribed and sworn to before me this 23 day of July, 1990

Notary Public, State of Texas
COUNTY OF [illegible]
JAMES B. PATTERSON
My Appointment Expires
Nov 14 1991

James B. Patterson
Notary

My Commission expires:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER Term, 1989

No._____

JOSE M. LOZADA,

Petitioner,

v.

GEORGE DEEDS, Warden, et al,

Respondent.

PROOF OF SERVICE

I, **Jose M. Lozada**, do swear or declare that on this date, _____, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS** and **PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

BRIAN McKAY, Attorney General
C/O Robert J. Gower, Deputy Attorney General
Criminal Justice Division
State Mailroom Complex
Las Vegas, Nevada 89158

Jose M. Lozada
Affiant

Subscribed and Sworn to Before Me
this 23 day of July, 1990.

Notary Public-State Of Nevada
COUNTY OF CLARK
JAMES P. PATTERSON
My Appointment Expires
Nov 12 1991

Notary Public in and for said
County and State.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden of S.D.C.C.,

BRIAN McKAY, A.G. of Nev.,

Respondent.

CV-S-89-173 LDG (LRL)

CASE NO. (To be supplied by the Clerk)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND SUPPORTING DECLARATION

(Pursuant to 28 U.S.C. §1915 and 28 U.S.C. §1746)

I hereby apply for leave to: (check one)

/XX/ Commence this action for habeas corpus/civil rights relief

/ / Pursue this action under 28 U.S.C. §2255 or Fed.R.Crim.P. 35

without prepayment of fees and costs or giving security therefor.

In support of my application, I state that the following facts are true:

1) I am the party initiating said action and I believe that I am entitled to relief.

2) The nature of this action is: Petition for Writ of HABEAS CORPUS pursuant to 28 U.S.C., Section 2254.

3) I am unable to prepay the costs of this action or give security therefor because of my poverty.

Exhibit "1"

4) I have no assets or funds which could be used to prepay the fees or costs, except: NONE ~~N/A~~

Inmate: Nevada Prison System ~~N/A~~

(Write "none" above if you have nothing; otherwise list your assets.)

5) During the preceding twelve months, I have received income (Wages, gifts or other payments) from the following sources:

NONE N/A

N/A

N/A

(List both amount and source.)

6) You may state briefly any additional financial or other information regarding your ability to pay the costs of this action (for example, persons who are dependent on you for support): NONE N/A

Inmate - S.D.C.C. N/A

Inmate: Nevada Prison System - No Money N/A

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. 28 U.S.C. §1746 and 18 U.S.C. §1621.

Executed at S.D.C.C., Indian Spg., NV (Location) on January 19 - 04 ~~December, 19~~ (Date)

Jose M. Losada
(Signature)

JOSE M. LOSADA

#23574
(Inmate's Prison Number)

I request that an authorized officer of the penal institution in which I am incarcerated complete the Certificate below regarding funds on deposit in my account at said institution.

Jose M. Lozada
(Signature)

Jose M. Lozada
(Name Printed)

23574
(Inmate's Prison Number)

- - - - - - - - - - -

CERTIFICATE

I hereby certify that on December 16, 1988 the movant herein had cash and securities in the amount of $ 63.76 on account to his/her credit at the penal institution where (s)he is confined.

(Please sign in ink in a color other than black.)

J Dunn
Authorized Officer of Penal Institution

12-16-88
(Date)

Asst Clk
(Title)

* * * * * * * * * * *

ORDER

In reliance upon the representations and information set forth in the above motion, declaration and certificate, IT IS ORDERED THAT

☑ The motion for leave to proceed in forma pauperis is granted, and the Clerk of the Court is directed to file the complaint. The movant herein is permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or the giving of security therefor.

☐ This order granting in forma pauperis status shall not extend to the issuance of subpoenas at government expense.

☐ The Clerk of the Court is directed to issue summons to defendant(s) herein and deliver the same to the United States Marshal for service.

☐ The plaintiff shall have twenty (20) days within which time to furnish to the United States Marshal the required forms USM 285.

☐ Plaintiff shall serve upon defendant(s) or, if appearance has been entered by counsel, upon the attorney(s), a copy of every further pleading, motion or other document submitted for consideration by the court. The plaintiff shall include with the original paper to be filed with the Clerk of the Court a certificate which states the date that a true and correct copy of any document was mailed to the defendant(s) or counsel for the defendant(s). Any paper received by a district judge or magistrate which has not been filed with the Clerk of the Court or which fails to include a certificate of service will be disregarded by the court.

☐ The Clerk of the Court shall file the petition for a writ of habeas corpus and shall serve respondent(s) by certified mail but the respondent(s) shall not have to answer said petition unless the court subsequently orders otherwise.

☐ This motion for leave to proceed ~~in forma~~ pauperis is denied.

Dated: 3 March 1989

UNITED STATES DISTRICT JUDGE/
UNITED STATES MAGISTRATE

FILED

District Court

CLARK COUNTY, NEVADA

JUN 2' 8 07 AM '88

Scott Lemon
CLERK

JOSE M. LOZADA,

Petitioner,

-VS-

THE STATE OF NEVADA,

Respondent.

Case No. C75275
Dept. No. III
Docket No. _____

ORDER FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

This matter having come before the Court and good cause appearing that the Petitioner herein has met the burden of responsibility in the matter of application for this ORDER, through the Motion for Permission to Proceed In Forma Pauperis, and showing due cause by and through the Affidavit as required by law, the Petitioner, herein is found to be justly qualified and competent to proceed without paying of fees or the costs of prosecuting this action, or the providing of securities thereof. Therefore it is:

ORDERED that the Petitioner herein be given Leave to Proceed in Forma Pauperis in the above-entitled matter before this Court.

DATED: June 16, 1988.

JOSEPH S. PAVLIKOWSKI

JUDGE OF THE DISTRIC COURT

Jose M. Lozada

Jose M. Lozada #23574
Petitioner In Pro-Per
P.O. BOX 208-SDCC
Indian Springs, Nevada 89070

Exhibit "2"

DCC law library

ORIGINAL

No. 90-5393

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1989

JOSE M. LOZADA,

Petitioner,

vs.

GEORGE DEEDS, Warden, et al,

Respondent.

PETITIONER FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RECEIVED
AUG 03 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Jose M. Lozada
So Desert Corr'l Ctr.
P.O. Box 208
Indian Springs, Nevada 89070

QUESTION FOR REVIEW

Whether Petitioner was denied effective assistance of counsel at a critical stage in the proceeding leading to his incarceration, because he was never apprised of his rights to an appeal and to counsel on appeal, and did he voluntarily, understandingly and intelligently acquiesced in his failure to take an appeal, and did the court error by not holding an evidentiary hearing on the merits.

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CONSTITUTION CITED:	
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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

JOSE M. LOZADA v. GEORGE DEEDS, 9th Cir. 1990, Case No.90-15612.

JOSE M. LOZADA v. GEORGE DEEDS, Dist. Ct. Nev. 1988, Case No. CV 89-173-LDG.

JOSE M. LOZADA v. THE STATE OF NEVADA, Nev. Sup. Ct. 1988, Case No.19333.

JOSE M. LOZADA v. STATE OF NEVADA, Dist. Ct., Clark County, Nev. 1988, Case No.C75275.

JURISDICTIONAL STATEMENTS

Jurisdiction of this Court is invoked due to the following:

1. On **May 30, 1990**, the United States Court of Appeal for the Ninth Circuit denied Petitioner's request for a certificate of probable cause;

2. On **April 3, 1990**, the United States District Court for the District of Nevada denied Petitioner's certificate of probable cause;

3. On **March 13, 1990**, the United States District Judge, Lloyd D. George, denied Petitioner's Writ of Habeas Corpuspursuant to 28 U.S.C. Section 2254, by a Person in State Custody;

5. On **October 21, 1988**, the Supreme of Court of Nevada Order dismissing appeal of appellant's petition for post-conviction relief;

6. On **July 18, 1988**, the District Court, Clark County, Nevada denied Petitioner's Petition for Post-Conviction Relief; and

7. Pursuant to Rule 10 of the Rules of this Court.

/ / / / / / / / / /

/ / / / / / / / / /

PROVISIONS INVOKED

1. The Constitution of the United States, Sixth Amendment, and Fifth and Fourteenth Amendments.

2. The Constitution of the State of Nevada, Article 1, Section 8;

3. Title 28 U.S.C. Section 2254(d);

4. Nevada Rules of Appellate Procedures; and

5. Nevada Revised Statues.

STATEMENT OF THE CASE

In **March 1986**, the Petitioner retained James Buchanan, Esquire for $3,000.00 dollars as defense counsel for a jury trial. On **November 5, 1986**, the juror returned a verdict of guity. Then on **December 16, 1986**, Petitioner was sentenced without defense counsel informing the trial court of his financial statute and desire to appeal. The trial court did not made an inquiry or informed him of his right to an appeal and to counsel no appeal. Petitioner also had a court-appointed interpreter throughout his jury trial and at sentencing. (See Exhibit "3")

On **June 16, 1988**, District Court, Clark County, Nevada held a hearing on Defendant's Proper Person Motion to Proceed in Forma Pauperis, Defendant's Proper Person Motion to Appoint Counsel, and Defendant's Proper Person Writ, Petitioner not present represented by James Buchanan, who was allowed to withdraw as counsel. Matter continued for Argument. (See Exhibit "3")

On **July 7, 1988**, District Court, Clark County, Nevada held a hearing for an argument on writ, Petitioner appearing in Proper Person with a court-appointed interpreter, and the Court summarily denied Petitioner's Writ of Habeas Corpus. (See Exhibit "3")

On **September 6, 1988**, Petitioner was "notified" that the Clerk of the Nevada Supreme Court has this day received the following: Record on Appeal, Vol. I (copy). (See Exhibit "4") Petitioner was never forward a copy of said Record on Appeal.

On **October 21, 1988**, the Supreme Court of Nevada dismissed his appeal stated: "(I)n the present case, appellant claimed claimed below that his counsel was ineffective because he failed to inform appellant that he had the right to appointed counsel in a direct appeal and because counsel falsely informed him that he had given appellant's case file to the public defender to prosecute appellant's direct appeal. Appellant neglected, however, to set forth any issues that could have been raised in a direct appeal, and further failed to allege or demonstrate that such an appeal would have been successful. Therefore, appellant failed to demonstrate that the alleged deficiencies of his counsel prejudiced him in any way." (See Exhibit "5")

On **March 13, 1990**, the United States District Court, District of Nevada denied Petitioner's Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 without an evidentiary hearing being held, and stated: "(C)ounsel's failure to inform Lozada of his right to appeal could very well have fallen below constitutional standards. However, the court need not decide that issue.. . . . . Consequently, he has not shown any prejudice flowing from counsel's failure to advise him of his right to appeal.. . . . . IT IS ORDERED THAT the United States Magistrate's Report and Recommendations (#9) be adopted." (See Exhibit "6")

. . .

. . .

On **April 3, 1990,** the United States District Court, District of Nevada, denied Petitioner's certificate of probable cause, and stated: "After reviewing the record in this case, the court determines that Lozada's appeal fails to raise a substantial question for review by the Circuit Court of Appeals. Lozada simply has not shown that he suffered any prejudice even if his attorney's conduct fell below constitutional standard. Thus, any appeal would be friviolous." (See Exhibit "7")

On **May 30, 1990,** the United States Court of Appeal for the Ninth Circuit denied Petitioner's request for a certificate of probable cause. (See Exhibit "8")

ARGUMENT

A close examination of this case will substantiate that there was no consideration given directly to the issue of whether Petitioner was informed in the first instance of a right to appeal, nor does it appear with clarity whether in fact the Petitioner in this case had been aware of his right to appeal. "(W)here the right to appeal a criminal conviction exists, it exists only by statute." See **Heike v. United States**, 217 U.S. 423, 30 S.Ct. 539, 54 L.Ed. 821 (1910). Under federal standards, one may not relinquish intentionally an unknown right. **Johnson v. Zerbst**, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); **Fay v. Noia**, 372 U.S. 319, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

In the instant case the determinative, basic question is whether Petitioner knew that he had a right to appeal. An indigent has a right to be advised that he is entitled to court-appointed counsel on appeal. **Douglas v. California**, 372 U.S. 353, 83 S.Ct. . . .

814, 9 L.Ed.2d 811 (1963); **Swenson v. Bosler**, 386 U.S. 258, 87 S.Ct. 996, 18 L.Ed.2d 33 (1967). In addition, a defendant, whether indigent or not, also has the right to be properly advised of his right to appeal. **Nelson v. Peyton**, 416 F.2d 1154 (4th Cir.1969), cert denied, 397 U.S. 1007, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970); **Willey v. Coiner**, 464 F.2d 525 (4th Cir.1972); **Daniels v. Alabama**, 487 F.2d 887, 888 (5th Cir.1973); **United States ex rel. Williams v. LaVallee**, 487 F.2d 1006 (2nd Cir.1973), cert denied, 416 U.S. 916, 94 S.Ct. 1622, 40 L.Ed.2d 118 (1974). The communication to the defendant his right to appeal is generally made by defense counsel or the court, which will satisfy federal standards. See **Jackson v. Turner**, 442 F.2d 1303, 1307 (10th Cir.1971); **United States ex rel. Singleton v. Woods**, 440 F.2d 835, 836 (7th Cir.1971); **United States ex rel. Smith v. McMann**, 417 F.2d 648, 654 (2nd Cir.1969), cert denied, 397 U.S. 925, 90 S.Ct. 929, 25 L.Ed.2d 105 (1970); **Goodwin v. Cardwell**, 432 F.2d 521 (6th Cir.1970).

Petitioner did not know of his right to appeal, and the absence of such knowledge is a clear indication that the was denied the effective assistance of counsel. **Compare** the case at bar with **Gairson v. Cupp**, 415 F.2d 352 (9th Cir.1969). This follows because he did have a right to appeal, and it was the duty of his counsel to advise him of the right and how and when to exercise it. In **Rodriguez v. United States**, 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969), rejected the requirement of showing of some likelihood of success on appeal as a condition precedent to habeas corpus relief. In addition, there was no evidentiary hearing held under the unusual circumstances of this case in accordance to the . . .

teaching of **Townsend v. Sain**, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), where all of the facts should have been further developed.

Petitioner implies that he was not provided effective assistance of counsel with respect to a critical stage in the proceeding leading to his incarceration so that, in accordance with current constitutional doctrine, he should be entitled to relief. See **Penson v. Ohio**, ___ U.S. ___, 109 S.Ct. 346 (1988), is the determinative basis for the protection of his appeallate rights.

The appropriate relief is indicated by the Supreme Court's disposition of **Lane v. Brown**, 372 U.S. 477, 485, 83 S.Ct. 768, 773 (1963). See also **Riser v. Craven**, 501 F.2d 381 (9th Cir.1975).

DATED this 29 day of June, 1990.

Respectfully submitted,

Jose M. Lozada
Petitioner In Pro-Pre

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Motion for Leave to Proceed In Forma Pauperis were mailed on 29 day of June, 1990, addressed to:

BRAIN McKAY, Attoney General
C/O Robert J. Gower, DAG
Criminal Justice Division
State Mailroom Complex
Las Vegas, Nevada 89158

Jose M. Lozada
So Desert Corr'l Ctr.
P.O. Box 208
Indian Springs, Nevada 89070
Petitioner In Pro-Per